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Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 906.

DAVID ATLAS,
Petitioner,

v.

EASTERN AIRLINES, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Opinions Below.

The citations of the opinions below are adequately set forth in the petition.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Question Presented.

The key question in the case at bar is whether or not an affidavit which merely states desired conclusions rather

than facts, which is in no way based on personal knowledge and which completely fails to show affirmatively that the affiant is competent to testify on the matters stated qualifies as an adequate affidavit in opposition under Rule 56(e).

Statute and Rule Involved.

The statute and rule involved are set forth in the petition. However, emphasis should be placed upon the first sentence of Rule 56(e), which is quoted as follows:

> "(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Statement.

The facts in the case at bar are accurately set forth in the opinion of the Court of Appeals, and therefore we will not repeat them here.

It might be helpful, however, for the Court to consider several additional facts. For instance, in 1947, nearly three years prior to the application for the patent in suit, petitioner was eagerly embarked on a program to "tell everyone" about the idea he eventually covered in a patent application (R. 331). He told newspaper and magazine reporters (R. 271-273) and delivered papers on it to the American Meteorological Society and the Institute of Radio Engineers (R. 33-34, 275). He freely disclosed it to American Airlines (R. 33-34, 275, 309-310) and, after having his paper describing it (R. 183-251) declassified for publication

(R. 253-255), he offered it for publication to the Institute of Radio Engineers (R. 269).[1] These things were all done in the latter part of 1947 or early 1948. In fact, by March 31, 1948, he had informed the patents branch of the Air Force, in charge of his application, of these things (R. 33-34, 275). The application for the patent in suit was not placed on file until September 12, 1950.

Another fact to consider is that petitioner regarded the invention as completely tested and proved as early as 1947. His original demonstration was done by taking a pair of standard radar components (IF amplifiers), inverting the output of one, and combining them in a ground radar installation (R. 314). He did these things in August of 1947, and, according to his testimony, "The disclosure and all the preparatory information was [*sic*] filed very early after the invention" (R. 309). His early model was not flown through storms in an airplane, but he testified that it "Didn't matter. I showed that it could work" (R. 323).

Still another fact worth noting is that petitioner himself has no personal knowledge or recollection of the August 12, 1949, press demonstration flight upon which the decision of "public use" of the Courts below was based. Nor has he offered any evidence of anyone else who has such knowledge. Nothing in the extensive depositions of various witnesses or in any of the affidavits filed by petitioner shows that petitioner was even aware of the August 12, 1949, flight at the time, and, although petitioner had ample time to take further depositions of Messrs. Ayer and White to cross-examine them on their affidavits in support of respondents' motion for summary judgment, he did not. Neither did he obtain any testimony or affidavits from the news reporters who witnessed the flight.

[1] The Institute did not, however, publish it.

Argument.

The case at bar is a patent case and the law is well settled with respect to the availability of summary judgment in such cases. Usually the issue is a technical one involving technical facts, and when, in some cases, these facts become so clearly established that no genuine issue remains, summary judgment is proper. *Steigleder* v. *Eberhard Faber Pencil Co.*, 81 F. Supp. 143; aff. 176 F. 2d 604; cert. den. 70 S. Ct. 244; 338 U.S. 893. *Soffron* v. *S. W. Lovell & Co., Inc.*, 246 F. 2d 769. *Belanger & Sons, Inc.*, v. *Brisk Waterproofing Co.*, 116 F. Supp. 127. Such a situation is quite different from a "complex anti-trust litigation where motive and intent play leading roles" as in the *Poller* case. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Accordingly we see no conflict whatsoever with the *Poller* case.

Secondly, since the patent in suit deals with an apparatus, a demonstration of that apparatus quite clearly can qualify as a public use. This is quite different from the fact situation in the *National Tube* case, cited by petitioner. *National Tube Co.* v. *Steel & Tubes Inc.*, 90 F. 2d 52 (1937). In that case the patent in suit was a process patent and the demonstration was merely of the product of the process, which product in itself failed to disclose the steps involved in the patented process. Moreover, the disclosure in that case was made under an injunction of secrecy, and therefore the *National Tube* case is not at all in point.

In the case at bar the respondents' affidavits clearly establish that the American Airlines press demonstration flight of August 12, 1949, was a public use of the patent in suit, and the only thing left to consider, then, is whether or not petitioner's affidavit in opposition (R. 73-75) is adequate to raise a genuine issue as to a material fact. The affidavit fails to meet the standard of Rule 56(e) because

petitioner has no personal knowledge of the August 12, 1949, flight and has no way to demonstrate a competency to testify to facts relating to it. Moreover, his general statement that the flight was "private and experimental" is defective technically because it does not identify specific equipment employed, and is actually more a statement of petitioner's desired conclusions than a statement of fact. Affidavits of this sort are not adequate to oppose a properly supported motion for summary judgment. *Jameson* v. *Jameson*, 176 F. 2d 58 (1949).

Accordingly we submit that the decision below is clearly correct and is not in conflict with any other decision of this Court or other Federal Courts. Moreover, no important question of Federal law is involved; and therefore this is not a proper case for review by the Supreme Court on certiorari.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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